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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 631

IN THE MATTER OF
CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY,
Debtor.

ISRAEL A. ABRAMS, ET AL., ETC.,
Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE MATTER OF
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioners seek to review a judgment (R. 156) of the United States Circuit Court of Appeals for the Seventh Circuit entered May 20, 1941, (rehearing denied June 23, 1941; R. 159) affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered November 13, 1940, (R. 124) in the pend-

ing reorganization proceeding, under Section 77 of the Bankruptcy Act, of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor. The decision of the Circuit Court of Appeals is reported at 121 Fed. (2nd) 371.

The order appealed from overruled the objections (R. 103) of the Petitioners herein to the report (R. 39) and order (R. 76) of the Interstate Commerce Commission of October 2, 1940, fixing maximum limits for allowances for fees and expenses incurred and compensation for services rendered in connection with the proceeding and plan therein and denied the fees and expenses requested by Petitioners. The Petitioners initiated the prosecution of their claim by filing a petition with the District Court (R. 13) pursuant to the provisions of Section 77 (c) (12), 11 U. S. C. A. 205 (c) (12), of the Bankruptcy Act. The petition was filed within the time fixed by order of Court dated April 26, 1940, (R. 10) and covered all services and expenses claimed up to the fifteenth day of May, 1940. The Petitioners, as set forth in said petition, represent the holders of Convertible Adjustment Mortgage Bonds of the Debtor in the principal amount of $31,500. (R. 14) They asked for an allowance of $12,500 for services and $436.80 for expenses incurred, all to be paid out of the Trust Estate. The prayer of that petition (R. 22) recites:

> "Wherefore, petitioner prays:
>
> 1. That after the Commission has fixed a maximum allowance to petitioner for the services rendered from July, 1935, to May 15, 1940, an order be entered herein authorizing and directing the Debtor's Trustees to pay to the firm of Shulman, Shulman and Abrams, out of the estate of the Debtor, the sum of Twelve Thousand Five Hundred Dollars ($12,500.00), or such other sum as the Commission may fix as a maximum allowance."

A detailed statement of the alleged services and expenses was attached to the petition so filed. That petition, with the petitions of other claimants, was referred to the Inter-

state Commerce Commission in accordance with the provisions of Section 77 (c) (12), a hearing was had upon the petitions filed and on October 2, 1940, the Commission made its report and order (R. 36-79) in which all claims filed were considered and a maximum limit was fixed for each claim. In three instances, one of which was the claim of Petitioners, a maximum limit of nothing was fixed. (R. 79)

Petitioners thereafter filed with the Commission a petition for rehearing or for modification of its order of October 2, 1940 (R. 81), and also filed with the District Court objections to the report and order of the Commission. (R. 103) The petition for rehearing was denied by the Commission on November 5, 1940. (R. 116) The District Court, on November 13, 1940, made Findings of Fact, Conclusions of Law and Order and Decree as to allowances to various claimants. (R. 117) Finding of Fact No. 4, so made by the Court, was as follows:

> "4. The Court finds that the maximum limits so fixed by the Commission in each case constitute reasonable allowances to be made to the respective claimants for services rendered and expenses incurred in connection with the proceedings and plan by said claimants up to May 15, 1940, and do not exceed reasonable compensation for such services and expenses." (R. 119)

These Findings, Conclusions, Order and Decree were made after hearings held pursuant to order and due notice upon objections to the plan of reorganization and petitions for allowances at which hearings the matter of allowances was, by agreement of all claimants, submitted to the Court upon the record made before the Examiner of the Interstate Commerce Commission. (R. 119) The Court's order overruling Petitioners' objections to the report and order of the Commission and denying the fees and expenses requested by Petitioners, which is the order appealed from, was likewise entered on November 13, 1940. (R. 124)

The record does not contain a stenographic transcript of the hearing before the Commission's Examiner but does contain a narrative statement (R. 2-9) in which Petitioners undertake to summarize their activities at the several hearings had before the Commission with reference to the plan of reorganization and their testimony given before the Examiner.

The Commission, in its report (R. 69) says:

> "Shulman, Shulman & Abrams represent holders of $31,500 of Convertible Adjustment Mortgage Bonds and performed services and incurred expenses from July 18, 1935. They intervened in the proceeding before the Court and the Commission, participated in hearings before the Commission on a plan of reorganization, filed exceptions to the report of the Examiner on a plan, and filed a petition for modification of the Commission's plan. They participated in the court proceeding on the question of the appointment of trustees, examined notices, motions and petitions, and appeared in court whenever necessary. They state that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a voting trust. We are not persuaded that the evidence supports such a statement. The firm submitted a statement showing the matters attended to on specific dates, but had no statement of time spent on the work. Its estimate of the time spent is 1,000 hours. We find that the services rendered were of no benefit to the estate."

and in its order, in which the various maximum limits of allowances are listed, the Commission provides:

> "(q) For services rendered and expenses incurred by Shulman, Shulman & Abrams, representing holders of the Debtor's bonds, nothing." (R. 79)

The Circuit Court of Appeals, in its opinion, (R. 148, 151) reviewed the legislative history of Section 77 (c) (12) and concluded that the Interstate Commerce Commission was authorized to fix maximum limits for the various indi-

vidual claimants and was not limited to the fixing of a maximum limit for the aggregate of allowances to the several claimants as contended by these Petitioners. The Court further held that there was no unauthorized delegation of judicial power to the Commission; that the claim presented arose after bankruptcy and that the claimants have no vested rights to any allowance out of the Trust Estate; that Congress had the power to refuse all compensation from the estate of the Debtor from which it follows that Congress could lawfully provide for limited compensation and designate the tribunal which should determine the maximum amount thereof. Finally, the Court points out that the Commission found that the services of the Petitioners were of no value to the estate and that, therefore, the charge that the Commission, in denying Petitioners any relief, acted arbitrarily and capriciously must be rejected. The Court concludes its opinion with the following:

> "In the face of the findings and conclusion of the Commission, which was within its authority, and which was backed by personal knowledge of the extent and value of services rendered, we are convinced that the District Court correctly held it was powerless to allow appellants any sum in this case." (R. 156)

SUMMARY OF ARGUMENT.

I. The order appealed from was one refusing to set aside the order of the Commission fixing maximum allowances. This latter order was made in strict conformity with the applicable statute.

(a) The statute authorizes the Commission to fix a maximum allowance for each claimant.

(b) Petitioners cannot complain of procedure which they specifically requested.

II. The District Court was without authority to make an allowance to Petitioners in excess of the maximum fixed or to set aside such maximum.

III. The record supports the action of the Commission and negatives any arbitrary action.

IV. The application of the statute (Section 77 (c) (12)) involves no improper delegation of judicial power.

V. Petitioners are deprived of no constitutional right as a result of the application of the statute.

VI. No ground for the issuance of the Writ as set forth in Rule 38 of this Court or otherwise is presented by the record.

ARGUMENT.

The Trustees of the property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents herein, respectfully submit that the case presented is not one in which certiorari should be granted for the reasons hereinafter set forth.

I.

The Order Appealed From Was One Refusing to Set Aside the Order of the Commission Fixing Maximum Allowances. This Latter Order Was Made in Strict Conformity With the Applicable Statute.

The statute pursuant to which Petitioners' application for allowances was submitted to the Interstate Commerce Commission for the fixing of a maximum is Section 77 (c) (12) of the Bankruptcy Act; 11 U. S. C. A. 205 (c) (12), which reads:

> "(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily."

Attention should also be called to a portion of Section 77 (e); 11 U. S. C. A. 205 (e). This subdivision provides for the certification of a plan by the Commission to the Court, the giving of notice to parties in interest of the time within which objections to such plan may be filed with the Court and for a hearing upon such objections, and then continues:

> "After such hearing and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of sub-section (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same."

Rule XLIX of the Rules in Bankruptcy of this Court provides, among other things, that the Clerk of the District Court in which any proceeding under Section 77 is pending shall forthwith transmit to the Interstate Commerce Commission copies of certain designated instruments, among others:

> "(1) Any application for allowances of compensa-

tion and expenses under the provisions of paragraphs (2) and (12) of sub-section (c) of Section 77, upon receipt of which the Commission shall determine the maximum limits of such allowances and file with the Court its report and order thereon, and any order making allowances for compensation and expenses under said paragraphs."

It is apparent from the foregoing that allowances of the character here involved made by the District Court must be within the maximum limits fixed by the Commission. The first sub-division quoted permits such allowances only within such limits. The Court rule quoted recognizes this limitation and sub-division (e), quoted above, expressly conditions the Court's approval of a plan upon the finding by the Court, among other things, that the amounts to be paid by the Debtor, or by any corporation or corporations acquiring the Debtor's assets, for expenses and fees incident to the reorganization are within such maximum limits fixed by the Commission.

It is difficult to see how Congress could have set forth with greater clarity the legislative intent to give to the Commission the power to fix maximum limits for allowances of this character beyond which the Court should not go.

This Court has pointed out, in

Dickinson Industrial Site, Inc., v. *Cowan*, 309 U. S., 382, 388,

that the purpose of reorganization statutes in thus regulating allowances to be made from the Trust Estate was to place such allowances under more effective control. To that end the statute required petitions for such allowances to be considered first by the Interstate Commerce Commission, a body skilled in matters affecting railroads and railroad reorganizations and well qualified to pass upon the value of the services rendered in connection therewith.

(a) *The Statute Authorizes the Commission to Fix a Maximum Allowance for Each Claimant.*

While Petitioners filed their petition asking that the Commission fix a maximum allowance for their services and that the Court make an order directing payment to them of such sum as the Commission might fix as such maximum, after the Commission, following a hearing, had fixed the maximum in their case at nothing, they then took the position on their appeal that under the statute quoted above the Commission was authorized only to limit the maximum expense or burden upon the Estate by fixing the maximum limit of the aggregate of the allowances to the several claimants and was not authorized to fix a maximum for an individual claimant.

There is certainly nothing in the statute which indicates that the Commission shall fix a maximum for the aggregate of all allowances as distinguished from limits for individual allowances. Moreover, it is difficult to see how the Commission could arrive at a maximum for the aggregate without taking into consideration the extent and character of the work performed by the individual claimants and reaching a conclusion as to the maximum limits which should be fixed in individual cases.

Moreover, as pointed out by the Circuit Court of Appeals, the language of the statute is significant. Sub-division (c) (12), in the opening line, refers to "maximum limits," indicating more than one limit, and again, in the last sentence of the sub-division, we find the provision that the Commission shall, after hearing, "fix the maximum allowances which may be allowed by the Court." Such allowances may be made "at such time or times" as the Commission may deem appropriate.

The Circuit Court of Appeals, in its opinion, (R. 148,

151) reviews the legislative history of the pertinent provision of the statute and reaches the conclusion that it was the legislative intent that the Commission fix a maximum for each claimant.

Petitioners, in their brief, (B. 20) state that the Commission in this proceeding fixed the aggregate maximum limit and then proceeded to make allowances to the individual claimants. We submit that the report of the Commission shows that the procedure followed was just the opposite. In its conclusions (R. 72) the Commission starts out by listing each claimant and thereupon fixes a maximum limit for each claim. The total of such maximum limits was arrived at by adding the individual limits so fixed. This is made clear by the recital in the Commission's report. (R. 71) We believe that this is the procedure uniformly followed by the Commission in the railroad cases which have come before it.

In that connection we call the Court's attention to the report of the Commission in

Savannah & A. Ry. Reorganization, Finance Docket No. 11336, 228 I. C. C. 543, 560.

The Commission there said:

> "The argument is advanced by some of the petitioners herein that under the statute we are required only to fix the 'outside limits' of allowances for all services and expenses appropriate to the financial and economic condition of the debtor, and that it is the exclusive function of the court to determine the exact amount of the individual allowances. To assume the correctness of this contention suggests the question whether our determination of outside limits should be based on considerations of the services rendered and expenses actually incurred or solely on considerations of the size of the estate, its financial structure, and its earning power. To decide that the considerations are to be exclusively those last enumerated would be to disregard such factors as eminence of counsel, the

nature of the services rendered by them, the degree of skill and ability required and displayed by them, the period covered by the negotiations and activities in connection with which the compensation is asked, and the time devoted to the services. But such a conclusion is not reasonable. Clearly, we must consider each of these matters and it follows that we must give detailed consideration to the services of each claimant. It is our view that in fixing maximum limits of allowances consideration should be given to all the matters referred to above, so that the total allowance for compensation and expenses may be within a reasonable maximum for the property involved and at the same time the individual allowances reasonable for each of the claimants. Since the maximum total allowance fixed by us is based in part on a consideration of the reasonable maximum for each claimant, it appears inappropriate that the total allowance should be distributed between the claimants on a different basis."

We cannot improve upon the argument advanced by the Commission in support of its own action.

So far as we are advised, this procedure has not been questioned in any decided Court case prior to this one.

(b) *Petitioners Cannot Complain of Procedure Which They Specifically Requested.*

As shown by the portion of the prayer of the original petition quoted in the Statement of Facts, the Court was specifically requested to make an allowance within the limit fixed by the Commission. The Court complied strictly with the request of the petition. Petitioners did not ask the Commission to fix an aggregate maximum limit to be used by the Court in arriving at individual allowances, but, on the contrary, asked both the Commission and the Court to do, so far as procedure is concerned, exactly what was done and what the statute requires, namely: to make an individual allowance to the

Petitioners after the Commission had fixed the maximum limit therefor. Petitioners should be precluded from objecting to the procedure followed by the rule of law announced in

United States v. *Memphis*, 97 U. S. 284, 292.
Mercelis v. *Wilson*, 235 U. S. 579, 583.

II.

The District Court Was Without Authority to Make an Allowance to Petitioners in Excess of the Maximum Fixed or to Set Aside Such Maximum.

If we are correct in our interpretation of the statute, then, obviously, the Commission having fixed the maximum limit, the Court, assuming the validity of the statute, could not make an allowance in excess of that limit. This view was taken by Judge Barnes in

In Re Chicago & North Western Railway Company, 35 Fed. Supp. 230,

in which the Court said, at page 258:

> "Counsel for some of the mortgage trustees have asked the court to find the reasonable value of their services. This the court must do within the maximum limits fixed by the Interstate Commerce Commission. But whether the reasonable value of the services exceeds the maximum limits fixed by the Commission is, so far as this court is concerned, an academic question which this court has no power to determine and which it accordingly must decline to examine."

Having in mind that the whole purpose of Section 77 (c) (12) was to give to the Commission the power to limit allowances, it is obvious that if the District Court, after the maximum is fixed, can review it and set it aside, then the whole purpose of the provision has been defeated and the result is the same as if the sub-division had not been enacted.

We submit that Petitioners are in error in asserting that the decision in this case is inconsistent with the decision of the same Court in

C. & N. W. Ry. Co. v. *Reconstruction Finance Corporation*, 121 Fed. (2nd) 791.

That was a case in which two orders were before the Circuit Court of Appeals. One of them was an order denying the motion of a Debtor in a Section 77 proceeding to direct the Interstate Commerce Commission to make and determine maximum allowance to the Debtor for expenses of printing the record on appeal. The other was an order denying the Debtor's motion for an allowance of an expense authorization to cover the printing of the record on appeal. The Court concluded that the order denying Debtor's petition for order directing the Interstate Commerce Commission to fix maximum limits should be affirmed but that the other order should be reversed and the case sent back to the District Court to determine what, if any, allowance should be made to the Debtor for said purpose, the Court taking the view that, in the light of the provisions of Section 77 giving the Court exclusive jurisdiction of the Debtor and its property, and in view of the further fact that the allowances sought were for future expenses, the case was not controlled by Section 77 (c) (12). The Court said, (798):

> "We do not say that the court should grant or deny the petition. On this question we do not now pass. We merely hold that it was within the court's power to act and to allow, if the facts warranted it, out of the estate of the debtor, the amount necessarily required for printing the record on appeal.
>
> "This authority is not controlled by Sec. 77, sub. c (12), which provides for payment out of the debtor's estate of actual and reasonable expenses, including reasonable attorney's fees incurred in connection with the proposed plan or plans by parties in interest and by reorganization managers and committees or other

representatives of creditors and stockholders, in which case the I. C. C. must determine the maximum allowances. *Abrams* v. *Scandrett, et al.*, 7 Cir., 121 Fed. (2nd) 371, decided by this court May 20, 1941."

The distinction between that case and this one was undoubtedly as clear to the Circuit Court of Appeals as it is to us, since upon the petition for rehearing in this case the Court considered the decision in the North Western case, (R. 158) which had been rendered in the meantime, and, after such consideration, denied the petition for rehearing. (R. 159)

The question of whether or not there is a review of the order of the Commission in fixing a maximum, and, if there is, by what method it shall be accomplished, is not here involved except insofar as it is contended that the District Court had such right of review and we submit that it is clear under the statute that no such review is provided. Moreover, it seems certain that to accomplish any such review of an order of the Commission, it would be necessary that the Commission be a party to the proceeding.

As we shall point out later herein, there is no question of arbitrary or capricious action on the part of the Commission in the light of the finding, after a full hearing, that the services for which compensation is claimed were of no value to the Trust Estate and consequently the question of existence or method of review in such cases is not presented.

We submit that there is no merit in the suggestion that the case where a limit of "nothing" is fixed differs from one involving other limits. As we shall later point out, the Commission, in arriving at maximum limits, passes upon certain questions of fact, particularly the value of the service rendered to the estate, and those questions are the same and the action of the Commission is the same,

whether or not the limit fixed is a substantial sum or nothing.

III.

The Record Supports the Action of the Commission and Negatives Any Arbitrary Action.

The record contains a narrative statement of the evidence which was before the Commission. (R. 2-9) It is to be presumed that Counsel, in preparing this narration, set out fairly and fully the services for which compensation was sought. It appears from the statement that the claim is made that at an early hearing before the Commission Counsel for the Petitioners brought out by cross-examination that the average net available income for certain years was less than the required fixed charges. It is hardly conceivable that at a hearing upon a plan of reorganization the earnings statements of the Debtor were not in the record and of necessity the plan being considered would set forth the required fixed charges and no claim is made that these facts were not before the Commission. It is further claimed that Counsel for Petitioners brought out what amounts to nothing more than a simple arithmetical deduction that, since under the proposed plan certain contingent interest was made cumulative, if it should turn out that the fixed charges exceeded the earnings, in case of default the stock and junior securities might be wiped out on foreclosure. It is urged that Counsel brought out through another witness in 1937, two years after the initial plan was proposed, that certain changes were desirable to remove some uncertainties. It further appears from the statement that Counsel objected to a postponement; that following an exchange of letters, between persons in no way connected with the Petitioners, certain modifications were proposed. It is pointed out that Counsel for the Petitioners participated in the pro-

ceedings relating to the appointment of Trustees and suggested that, in addition to an officer of the Debtor, an independent Trustee be appointed, something that was required by the law at the time of the actual appointment of the Trustees. Sec. 77 (c) (1); 11 U. S. C. A. 205 (c) (1). It is also stated that Counsel for Petitioners interviewed several persons as to their availability for appointment as Trustee but it turned out that none so interviewed desired the position. Finally, the statement recites that Counsel for the Petitioners opposed the Voting Trust but a provision for a Voting Trust was ultimately included in the plan.

It hardly seems possible that upon such a record Counsel would urge that the action of the Commission in concluding that his services were of no value to the Trust Estate was arbitrary action. The Commission, at the time of its order, not only had before it the complete transcript of the hearings before its Examiner, which hearings were extensive and at which Petitioners had every opportunity to be heard, but it also had the record of the entire proceeding and had firsthand knowledge of what was done by all interested parties, including Petitioners and their Counsel, in connection with all of the hearings before the Commission. The Commission was, therefore, in the best possible position to determine what, if anything, was contributed by the claimants to the proceeding or the plan. In the face of that record and firsthand knowledge, the Commission concluded that Petitioners had contributed nothing of value and fixed the maximum to be allowed at zero. Two Courts have declined to overturn the Commission's action and we submit that the record presents not even a suspicion of arbitrary action in the premises.

Petitioners make much of the statement in the opinion of the Circuit Court of Appeals that the evidence upon which the finding of no value to the estate was made was

not before the District Court. As pointed out in the Statement of Facts the matter of allowances was submitted to the Court upon the record made before the Examiner of the Interstate Commerce Commission. (R. 119) The Commission, in addition, had personal knowledge of the participation by Petitioners and their Counsel in the hearings before it. The District Court did not have this firsthand information and we believe that is what the Circuit Court of Appeals had in mind in using the language to which Counsel refers. When the Petitioners raised this same point in their petition for rehearing in the Circuit Court of Appeals, we suggested this probable explanation of the statement. The Court denied the petition for rehearing and made no change in the statement or in its judgment. However that may be, Petitioners presented to the Circuit Court of Appeals, and now present here, their narration of the evidence as to their services and upon such showing the Circuit Court of Appeals concluded, we think correctly, that it could not be said that the refusal of allowance to Petitioners was arbitrary or capricious.

In cases where the right of review admittedly exists, we believe it must be conceded that the findings of the Commission will not be disturbed unless it appears that the Commission acted arbitrarily or without evidence to support its conclusion or that it transcended its constitutional or statutory powers.

Standard Oil Co. v. *U. S.*, 283 U. S. 235, 240.

Seaboard Air Line Ry. Co. v. *U. S.*, 254 U. S. 57, 62.

Interstate Commerce Commission v. *Union Pacific R. R.*, 222 U. S. 541, 547.

Petitioners offer as an answer to our contention under this point of the argument that they were granted the right of intervention in the proceeding from which it must be assumed that intervention was necessary; that through

their Counsel they did a certain amount of work and participated in the hearings and from that it follows that they are entitled to compensation, regardless of whether or not their efforts have been of any benefit to the Trust Estate. Incidentally, they say that the beneficial character of the service cannot be determined until the plan is finally passed upon. They seek also to distinguish the 77B cases and point out that there is no requirement under Section 77 that the services to be compensated contribute beneficially to the estate.

The answer to these contentions is clear. The services for which compensation was sought were rendered prior to the hearing upon the plan before the District Court but the proceedings had reached a stage where such hearings were imminent. The work leading up to the framing of the plan and its submission had been done and the Commission was in the best position possible to determine the value of the alleged services. The contention that any intervenor is entitled to compensation for any work done is both contrary to the spirit of the statute and to common sense. To carry Petitioners' contention to its logical conclusion, the Commission would be required to fix a maximum limit in some amount for any claimant who secured the right to intervene, appeared at the hearings, filed a petition for an allowance and prosecuted it through a hearing. We submit that such a construction of the statute cannot be justified.

The substantial difference upon the point of allowance between Section 77B proceedings and the proceedings under Section 77 is that in 77 proceedings the Commission fixes the maximum limit whereas in 77B proceedings the matter of allowances is left to the Court, but the character of the service that should be compensated is the same in both proceedings. The cases generally hold that the character of the service, to be compensable from the funds

of the estate, must in some way have contributed to the proceeding or the plan or have promoted or assisted in the development or adoption of a plan or have benefited the estate of the Debtor. A few of the leading cases will be sufficient to illustrate the rule:

In Re United Cigar Stores, 21 Fed. Supp. 869, 874.

In Re Consolidated Motor Parts, Inc., 85 Fed. (2nd) 579, 581.

In Re Tower Building Corp., 88 Fed. (2nd) 347, 349.

In Re Nine North Church Street, Inc., 89 Fed. (2nd) 13, 14.

In Re A. Herz, Inc., 81 Fed. (2nd) 511, 512.

Straus, et al. v. *Baker Co.,* 87 Fed. (2nd) 401, 407.

Silver v. *Scullin Steel Co.,* 98 Fed. (2nd) 503, 505.

Schnader v. *Reading Hotel Corp.,* 105 Fed. (2nd) 572, 573.

In the case of *D. & R. G. W. R. Co.* v. *McCarthy,* 111 Fed. (2nd) 820, 823, the Circuit Court of Appeals of the Tenth Circuit considered the question of allowances in a Section 77 proceeding and in the opinion makes it clear that the action of the Trial Judge, in postponing the making of an allowance within the maximum limit fixed by the Commission until the proceedings had reached a stage so that he might be in a position to properly appraise the value of the services, especially those rendered in connection with the plan of reorganization, was justified. This indicates that the attitude of the Court was that the requirement of benefit to the Trust Estate is the same in Section 77 proceedings as in those arising under 77B.

In the last analysis, the Petitioners here desire to set aside a finding of the Interstate Commerce Commission made after an extensive hearing and full consideration. It is submitted that there was no error or arbitrary action

upon the part of the Commission in reaching the conclusion that the services claimed were not compensable out of the Estate of the Debtor.

IV.

The Application of the Statute (Section 77(c) (12)) Involves No Improper Delegation of Judicial Power.

The delegation of quasi-judicial functions to Administrative Commissions is not new. In fact, the delegation of such powers to the Interstate Commerce Commission is quite old. The case of *Kline* v. *Burke Construction Company*, 260 U. S. 226, 234, makes it clear that the inferior Federal Courts derive their jurisdiction from the authority of Congress and that Congress may give, withhold or restrict such jurisdiction at its discretion provided it be not extended beyond the boundaries fixed by the Constitution.

Many decided cases have involved action by Administrative Commissions in which the alleged delegation of judicial power has been considered. The following are typical examples:

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 400.

Sullivan v. *Union Stockyards Co. of Omaha, Ltd.*, 26 Fed. (2nd) 60, 61.

Arkansas Wholesale Grocers' Assn. v. *Federal Trade Commission*, 18 Fed. (2nd) 866, 871.

Shields v. *Utah Idaho Cent. R. R. Co.*, 305 U. S. 177, 180.

Shouse v. *Moore*, 11 Fed. Supp. 784, 786.

The *Bituminous Coal Act of 1937*, giving to the Bituminous Coal Commission authority to determine certain issues and exemptions, was under consideration in the *Sunshine Anthracite Coal Company case*, 310 U. S. 381, 400.

The Court, in upholding the constitutionality of the Act, at page 400, said:

> "Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act. *Shields* v. *Utah Idaho Central R. Co., supra,* p. 180. The fact that such determination involved an interpretation of the term 'bituminous coal' is of no more significance here than was the fact that in the *Shields case* a decision by the Interstate commerce Commission of what constituted an 'interurban' electric railway was necessary for the ultimate finding as to the applicability of the Railway Labor Act to carriers. That problem involves no more than the adequacy of the standard governing the exercise of the delegated authority. Furthermore, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under Sec. 6 (b) of the Commission's denial of its application for exemption. The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146."

The following language is found in *Shields* v. *Utah Idaho Cent. R. R. Co.,* 305 U. S. 177, 180, where the Court was considering a finding of the Commission that certain lines of the railroad company did not constitute an interurban electric railway and, therefore, did not come within the exceptions set forth in the *Railway Labor Act*:

> "As Congress was free to establish the categories which should be excepted, Congress could bring to its

aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 51. For that purpose Congress could create a new administrative agency or use one already existing. And as the questions of fact involved would relate to methods of railroad transportation, and thus to a field in which the Interstate Commerce Commission had peculiar expertness, Congress could fittingly commit the determination to that body."

In the *Arkansas Wholesale Grocers' Assn. case,* 18 Fed. (2nd) 866, the *Federal Trade Commission Act* was involved. The opinion, at page 871, contains this language:

"The general power of Congress to clothe an administrative body with such authority is thus expressed by the Supreme Court in *Union Bridge Co.* v. *U. S.,* 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523:

" 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Id., page 387 (27 S. Ct. 374)."

The case of *Sullivan* v. *Union Stockyards Co. of Omaha, Ltd.,* 26 Fed. (2nd) 60, involved the *Packers & Stockyards Act of 1921* and the Court, in discussing the question of judicial powers, at page 61, said:

"It is claimed, however, that such an interpretation of the Packers and Stockyards Act and of the Act to Regulate Commerce renders them unconstitutional, because it gives to the Secretary of Agriculture, in the one instance, and to the Interstate Commerce Commission, in the other, judicial powers. No case is cited in the plaintiff's brief which has any bearing on the specific question. He refers to the general proposition that executive, legislative, and judicial functions

shall be kept separate, and that persons intrusted with power in any one of these three branches shall not be permitted to encroach upon the powers confided to others. About this, of course, there is no dispute. * * *

"It is the general rule that 'statutes conferring on officers, boards, or commissions quasi judicial functions, as, for example, the necessity of inquiry into, and a finding of, facts incidental to the exercise of powers properly within the scope of legislative or executive authority, are not unconstitutional as encroachments on the judiciary.' 12 C. J. 809."

In the case of *In Re New York, New Haven & Hartford R. Co.*, 16 Fed. Supp. 504, 507, the Court was discussing another provision in Section 77 to the effect that no plan of reorganization shall be approved or confirmed by the Judge unless the plan shall first have been approved by the Commission. The Court says:

"As stated, the criticism here is not that power was conferred upon the Interstate Commerce Commission, which constitutionally it was incapable of receiving, but rather that the exercise of a judicial power, which under article 3, section 1, may be vested only in a court, was expressly conditioned upon prior action of the Commission.

"But the limitation, against which the petitioner inveighs, is not at all a limitation upon the judicial power; it serves not at all to constrain the court in the unfettered performance of its judicial function when once the conditions prescribed by Congress as prerequisites to its jurisdiction have attached. At most, it is a jurisdictional limitation restricting the field which is subjected to the operation of the judicial power. Within the field defined, there is no attempt to subject the judicial power to the control of the legislative or executive departments. Such a jurisdictional limitation upon the court is wholly within the constitutional power of Congress to impose. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077; *Sheldon* v. *Sill*, 8 How. 441, 448, 12 L. Ed. 1147."

It will be observed that the matter of formulating the plan of reorganization and requiring that the Court shall pass only upon such plan as the Commission formulates is a very much more important matter than the question of allowances to claimants.

Opposing Counsel rely (B. 16) upon the case of *Benson* v. *Crowell*, 33 Fed. (2nd) 137, affirmed in 45 Fed. (2nd) 666; Certiorari allowed in 283 U. S., 814, and affirmed in 285 U. S. 22. That case arose under the Longshoremen's and Harbor Workers' Compensation Act. The action was brought to enjoin the enforcement of an award and it was enjoined upon the ground that the claimant was not an employee and, therefore, the necessary jurisdiction to make the award did not exist. Moreover, provision for review was specifically made and the review was accomplished by an independent proceeding.

Counsel also quote from several reports of the Interstate Commerce Commission (B. 17-18) in which the Commission, in certain instances, fixed a maximum limit and left for the Court's decision the question of whether or not the service was of a kind that was compensable out of the Debtor's Estate, stating that it was the function of the Court and not of the Commission to determine whether and to what extent such allowances constitute a proper charge. A typical example is in the *Erie Reorganization*, 240 I. C. C., 673, 694, where one question was whether allowances for services rendered to lessor companies of the Debtor should be paid out of the Estate of the lessee and this was held to be a Court question. The other cases cited are similar and do not conflict with the conclusion that it is the proper function of the Commission under the statute to determine whether the services rendered were of any value to the Estate. Admittedly, Counsel for Petitioners put in certain time and there is no question as to whether or not these claimants were in a class which could reason-

ably be compensated out of the Debtor's Estate for any useful service, but the question was rather whether or not any service beneficial to the Estate had in fact been rendered.

The questions involved in connection with this claim were the nature of the services rendered and benefits inuring to the Estate, if any, and the value of the services, fact questions. In discussing such a situation the Court, in the case of *Silver* v. *Scullin Steel Co.*, 98 Fed. (2nd) 503, 506, says:

> "(10, 11) When an application for an allowance of fees out of the estate of a debtor is made by counsel retained by creditors or stockholders, the question of what services were actually rendered, the question of the benefits which inured to the estate because of the services rendered, and the question of what proportion of the total services performed can be and should be paid for by the estate, are mainly questions of fact, and the conclusion of the court of bankruptcy as to what may reasonably be charged to the estate on account of such services, should, therefore, not be disturbed on appeal unless it clearly can be seen that there is no adequate factual basis for such conclusion or that the court proceeded upon an erroneous theory of the law in arriving at it."

In fixing a maximum limit the Commission exercises its discretion but certainly the exercise of discretion by the Commission in the decision of the many questions presented to it does not constitute an exercise of judicial power within the prohibition of the Constitution. The right of the Commission to exercise discretion has been expressly recognized.

> *U. S., ex rel. Chicago Great Western R. Co.* v. *I. C. C.*, 71 Fed. (2nd) 336, 340.

V.

Petitioners Are Deprived of No Constitutional Right as a Result of the Application of the Statute.

The right to an allowance for services rendered by claimants such as Petitioners in connection with reorganization proceedings and plans does not exist in the absence of statute. If Section 77 (c) (12) is for any reason invalid and claimants are deprived of its application, then neither they nor other claimants have any right to seek compensation from the Estate of the Debtor. It may be said generally that allowances to creditors, counsel for creditors, mortgage trustees, committees and claimants of that character are not provided for in ordinary bankruptcy proceedings. The Circuit Court of Appeals for the Second Circuit, in the case of *In re Realty Associates Securities Corporation,* 69 Fed. (2nd) 41, 42, says:

> "No provision is made in bankruptcy for payment of compensation or expenses to creditors or creditors' committees or their counsel in instances of ordinary bankruptcy administration."

The same Court states the rule in another case *In re Paramount Publix Corp.,* 85 Fed. (2nd) 588, 590, as follows:

> "Both in proceedings in equity and in bankruptcy simpliciter it is the ordinary rule that attorneys representing creditors, security holders, or stockholders must look for compensation to their clients rather than to the general estate. *In re New York Investors* (C. C. A.) 79 F. (2d) 182, 186, certiorari denied *Endelman* v. *Reconstruction Finance Corp.,* 296 U. S. 649, 56 S. Ct. 308, 80 L. Ed. 462; *In re Realty Associates Securities Corporation* (C. C. A.) 69 F. (2d) 41, certiorari denied *Bondholders' Committee* v. *Realty Associates Securities Corp.,* 292 U. S. 628, 54 S. Ct. 631, 78 L. Ed. 1482."

The allowance in equity proceedings of reasonable compensation out of a trust fund to one who at his expense

takes proper proceedings to preserve the trust property from destruction and restore it to the purposes of the trust is more restricted than the statutory rules under the Bankruptcy Reorganization Acts. The equity doctrine would not authorize the payment of claims of the character here presented.

See *Collection of Authorities*, 49 A. L. R. 149 and 107 A. L. R. 749.

Section 77B, 11 U. S. C. A. 207, and Chapter X of the Chandler Act, 11 U. S. C. A., 642, create a statutory right to make certain allowances in the reorganization proceedings of other than railroad corporations and a similar right in railroad reorganizations is fixed by Section 77 (c) (12), 11 U. S. C. A. 205 (c) (12).

When Section 77 was enacted the right to allowances was one which Congress could give or withhold as it saw fit. It might have provided positively that no such allowances should be made. From this it would seem to follow that Congress could place a limitation upon such allowances. In the case of *Nuckolls* v. *U. S.*, 76 Fed. (2nd) 357, 360, the Court, in considering the provisions of the Revenue Act of 1928, says this, with reference to conditions attached by Congress to privileges granted by statute:

> "Congress is not required by the Constitution to extend the privilege at all, as indeed it did not prior to 1926; when it did so, it had a right to attach thereto this condition. The taxpayer is not obliged to avail himself of the privilege conferred; if he does so, he takes it with the condition attached. He cannot complain that his constitutional right has been invaded by virtue of his own voluntary act in availing himself of a conditional privilege tendered him. If he does not like the condition, he need not exercise the option."

It is submitted that no more reasonable limitation could be conceived in a case like this than that a maximum limit be fixed by a skilled and experienced Commission, after a

full hearing and consideration of the facts bearing upon the character and extent of the services performed.

It, therefore, appears that Petitioners are in the position of claimants who under prior existing law had no right at all vested or otherwise. Congress saw fit to give a right which it could entirely withhold but which it saw fit to give with certain reasonable limitations which it was authorized to prescribe. It is submitted that under the circumstances no question of due process or other constitutional limitation is involved.

VI.

No Ground for the Issuance of the Writ as Set Forth in Rule 38 of This Court or Otherwise Is Presented by the Record.

While the claim of Petitioners involves the construction of a Federal Statute, it does not appear that there is any dispute in the authorities as to the proper interpretation or application of the statute involved. The meaning of the statute appears upon its face to be clear, and, in view of the great number of pending reorganization proceedings, it would seem, in the absence of a decision presenting a controversy as to interpretation or application of Section 77(c)(12), that the courts in which the question of allowances has arisen have had no difficulty in construing or applying the law. Our search discloses no conflict in the authorities upon the questions here involved. While it may be said that a question of Federal law is involved, it is submitted that the question is not important in view of the clear language of the statute and its purpose to limit allowances made by the court within the maximum fixed by the Commission. Certainly there is no departure shown from the accepted and usual course of judicial proceedings. While the statute is new, the principles relied upon are old and so

well settled that it cannot be said that a question of general importance is presented. It is further submitted that the decision of the lower courts is so obviously sound that there is no justification for granting the writ for the purpose of further review. Moreover, a case is presented where two courts have decided contrary to the contention of the Petitioners.

Petitioners rely mainly upon the contention that Congress has unlawfully vested judicial power in an administrative body and the further contention that Petitioners have been deprived of rights without due process. A very large portion of what precedes in this brief has been devoted to pointing out the error of Petitioners' contentions as to both of these points, and the rules applying are so well settled as not to admit of doubt.

The contention is made that the decision here is contrary to another decision of the same Circuit Court of Appeals in *In Re Chicago & North Western Ry. Co.*, 121 Fed. (2nd) 791.

We have already pointed out the distinguishing characteristics of that case. The Court there was dealing with an application in behalf of the Debtor for an allowance for an expenditure not yet made and clearly held that the claim there presented did not fall within the class controlled by sub-section (c) (12). The Court in that case made it very clear that in cases falling within that sub-section the District Court was limited by the maximum fixed by the Commission. The appeal from the order denying the Debtor's petition for an order directing the Commission to fix maximum limits was affirmed. That case and this one were decided by the same Court and only a short time intervened between the decisions. The decision in the North Western case was presented to and considered by the Circuit Court of Appeals when it passed upon the petition for rehearing in this case. (R. 158) We submit that the Court properly interpreted its own decisions.

Conclusion.

We believe, therefore, that the case is one where the Interstate Commerce Commission properly exercised a power granted to it by the express terms of the applicable statute; that this statute does not, by its terms or in its application, come within any Constitutional prohibition; that the record fully justifies the finding of the Commission; that both the District Court and the Circuit Court of Appeals were correct in their conclusions and these Respondents respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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